Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Preserving the Open Internet	)	GN Docket No. 09-191
	)	
Broadband Industry Practices	)	WC Docket No. 07-52

REPLY COMMENTS OF THE OPEN INTERNET COALITION

Markham C. Erickson
Holch & Erickson LLP
And
Executive Director
Open Internet Coalition
400 N. Capitol Street, NW
Suite 585
Washington, DC 20001
Tel.: +1 202 – 624 – 1460
Facsimile: +1 202 – 393 – 5218
Email: merickson@holcherickson.com

April 26, 2010

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In the wake of the decision in *Comcast v. FCC,* consumers, entrepreneurs, and venture capitalists are left with little or no reasonable avenues to file a complaint that any lawful application, content, or speech is being discriminated against or blocked by the facilities that are supposed to serve as conduits for lawful transmissions to and from the Internet.

Today's predicament is unique. For most of the Internet's history, the Commission has protected users' right to choose the content and services they want from the Internet. This innovation-without-permission regulatory structure kept the Internet free from regulation while imposing basic rules on the facilities that provide connections to the Internet. These rules provided a guarantee that technologists could develop new online products without interference from Internet access providers. Such rules fueled the most innovative years in the history of communications.

To preserve and protect the Internet, the Open Internet Coalition calls on the Federal Communications Commission to quickly initiate a proceeding to put its proposed regulatory structure in this docket and other broadband-related dockets on a solid legal foundation. The OIC believes the FCC has the legal authority to do so, and it encourages the Commission to move expeditiously.

The OIC notes that there is widespread support for light-touch, network neutrality rules to preserve the Internet as the great engine of ideas, innovation,

and discourse around the globe. Open Internet rules, as amended by the OIC, would create a flexible, light touch framework that ensures that broadband Internet access providers cannot turn the Internet into something that more resembles cable television than the innovation-without-permission Internet that has been so successful. The OIC's approach also ensures that the Internet itself remain free from regulation, which has been a hallmark of the Internet's success.

Too often, those that follow the debate in this docket have focused on the positions of one major corporation relative to those of another major corporation. The OIC has said from its earliest filings at the Commission, however, that this debate is really about protecting the most humble actors in society, including small businesses. As our attached report underscores, small and medium-sized businesses represent more than half of the U.S. gross domestic product and generate two-thirds of new jobs.

Small businesses are innovators. They produce 13 times more patents per employee than large patenting firms, and such patents are twice as likely as large firms to be among the one percent most cited.

As our study makes clear, broadband is an essential tool that will multiply the productivity, efficiency, and profitability of small businesses. The paper concludes that a key factor in small businesses being able to leverage the full benefit of the Internet's dynamic externalities is having unimpeded access to a user base. Such access will be protected through the enactment of network

neutrality rules that protect these small businesses' ability to reach users around the globe without being discriminated against by broadband access providers.

We also note in this filing that there is overwhelming support for codification of the six open Internet principles. Such supporters include consumer groups, educational institutions, Internet and technology companies, library organizations, direct broadcast satellite providers, Internet backbone providers, mobile broadband access providers, leading law professors and academics, and venture capitalists and entrepreneurs.

In fact there is no serious opposition to codification of the Broadband Policy Statement's principles plus a transparency principle. Some of the broadband access providers oppose codification of the nondiscrimination principle and the application of the rules to wireless platforms. This proceeding has narrowed the debate to those points, which is helpful. As we argue below, opposition to codification of the nondiscrimination principle and application to wireless platforms is not supported by technical or marketplace realities. Certainly, there is nothing in this docket to dissuade the Commission from including those two principles in a final rule.

Ultimately, the OIC believes that the proposed framework in this docket, as modified by the OIC's suggestions, will create a flexible, light touch regulatory structure that will protect users' access to the Internet and preserve the qualities that have made the Internet the most important communications tool in history.

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	GN Docket No. 09-191
Preserving the Open Internet	)	
	)	WC Docket No. 07-52
Broadband Industry Practices	)	
	)	

REPLY COMMENTS OF THE OPEN INTERNET COALITION

The Open Internet Coalition ("OIC") submits the following reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") October 22, 2009 Notice of Proposed Rulemaking ("NPRM" or "Notice"), FCC No. 09-93, in the above-captioned proceedings.

I. INTRODUCTION

Protection of broadband openness draws broad support from voices across American society. Business people, investors, lawmakers, and ordinary citizens have spoken out clearly and consistently in support of the common-sense view that openness has made the Internet a successful part of our economy, our civic life, and our daily lives and, thus, should receive protection under the law.

President Obama eloquently and repeatedly has made the case for such protection, both as a Senator and President. On February 1, 2010, the President

once again reiterated his administration's commitment to broadband openness, indicating his support for adoption of a neutrality rule:

> I'm a big believer in net neutrality. I campaigned on this. I continue to be a strong supporter of it. My FCC Chairman, Julius Genachowski, has indicated that he shares the view that we've got to keep the Internet open, that we don't want to create a bunch of gateways that prevent somebody who doesn't have a lot of money but has a good idea from being able to start their next YouTube or their next Google on the Internet.
>
> This is something we're committed to. We're getting pushback, obviously, from some of the bigger carriers who would like to be able to charge more fees and extract more money from wealthier customers. But we think that runs counter to the whole spirit of openness that has made the Internet such a powerful engine for not only economic growth, but also for the generation of ideas and creativity.[1]

Along with the President, key congressional leaders have voiced support for network neutrality rules, including Speaker Nancy Pelosi, Senate Majority Leader Harry Reid, House Energy and Commerce Chairman Henry Waxman, and Senate Commerce, Science and Transportation Committee Chairman Jay Rockefeller.[2]

---

[1] That Time You Interviewed the President, The White House Blog, Feb. 1, 2010, http://www.whitehouse.gov/blog/2010/02/01/time-you-interviewed-president

[2] *See, e.g.*, Opening Statement of Rep. Henry Waxman at the Joint Subcommittee Hearing, "Driven to Distraction: Technological Devices and Vehicle Safety," Nov. 4, 2009 "As you know, I am a proponent of strong net neutrality rules…"; "Senator Pledges Support for Net Neutrality, Broadband Plan," *PCWorld*, Apr.14, 2010; Speaker Pelosi Issues Statement on FCC Chairman's Announcement of Proposed New Rules on Net Neutrality, Sept. 28, 2009 "I applaud Chairman Genachowski and the FCC for undertaking a rulemaking process to preserve

In addition to voices from government, many leaders in the technology sector – those intimately involved on a daily basis with the businesses that have led to the Internet's rapid growth and expansion – also have spoken out in support of open Internet rules. On October 21, 2009, 30 of America's leading venture capitalists sent a letter to Chairman Genachowski stating:

> We write to express our support for the Commission's ongoing efforts to adopt rules to safeguard the open Internet. As business investors in technology companies, we have first-hand experience with the importance of a guaranteeing an open market for new applications and services on the Internet. Clear rules to protect and promote innovation at the edges of the Internet will reinforce the core principles that led to its extraordinary social and economic benefits. Open markets for Internet content will drive investment, entrepreneurship and innovation. For these reasons, Net Neutrality policy is pro-investment, pro-competition, and pro-consumer.
>
> Permitting network operators to close network platforms or control the applications market by favoring certain kinds of content would endanger innovation and investment in an investment sector which represents many billions of dollars in economic activity. The Commission is absolutely correct to propose clear rules that require competition. The promise of permanently securing an open Internet will deliver consumers and innovators a perfect free market that drives investment, job creation, and consumer welfare. These principles should apply across all Internet access networks, wired or wireless.
>
> Investment and innovation at the edge of the network will create not just jobs but also new tools and opportunities for communication, education, health care, business, and every

---

openness and competition on the Internet. By embracing principles of nondiscrimination and transparency, this proceeding will ensure that the Internet continues to be an engine of innovation, job creation and free speech for all Americans.")

other human endeavor.[3]

And on October 19, 2009, 28 leading Internet and technology CEOs and founders sent a letter to Chairman Genachowski stating, in pertinent part:

> For most of the Internet's history, FCC rules have ensured that consumers have been able to choose the content and services they want over their Internet connections. Entrepreneurs, technologists, and venture capitalists have previously been able to develop new online products and services with the guarantee of neutral, nondiscriminatory access by users, which has fueled an unprecedented era of economic growth and creativity. Existing businesses have been able to leverage the power of the Internet to develop innovative product lines, reach new consumers, and create new ways of doing business.
>
> An open Internet fuels a competitive and efficient marketplace, where consumers make the ultimate choices about which products succeed and which fail. This allows businesses of all sizes, from the smallest startup to larger corporations, to compete, yielding maximum economic growth and opportunity.
>
> America's leadership in the technology space has been due, in large part, to the open Internet. We applaud your leadership in initiating a process to develop rules to ensure that the qualities that have made the Internet so successful are protected.[4]

---

[3] *See* Comments of the Open Internet Coalition, Appendix B at 96-97 (Signatories include: Immad Akhund, Brian Ascher, Aneel Bhusri, Matt Blumberg, Brad Burnham, Stewart Butterfield, Ron Conway, John Doerr, Timothy Draper, Caterina Fake, Brad Feld, Peter Fenton, Eyal Goldwerger, Jude Gomila, Mark Gorenberg, Jordan Greenhall, Bill Gurley, Jed Katz, Dany Levy, Mario Morino, Jason Mendelson, Michael Moritz, Kim Polese, Avner Ronen, Pete Sheinbaum, Ram Shriram, David Sze, Albert Wenger, Steve Westly, and Fred Wilson.)

[4] *See* Comments of the Open Internet Coalition, Appendix A at 94-95 (Signatories include: Jared Kopf, Jeff Bezos, Ashwin Navin, James F. Geiger, Craig Newmark, Jay Adelson, Kevin Rose, John Donahoe, Charles E. Ergen, Erik Blachford, Mark Zuckerberg, Caterina Fake, Eric Schmidt, Barry Diller, Reid Hoffman, Scott Heiferman, John Lilly, Reed Hastings, Howard Janzen, David Ulevitch, Josh

Support for these policies in the technology sector goes beyond the executives and investors. It includes the very architects who designed the protocols and programming language of the early Internet. The engineers who pioneered the Internet's development wrote Chairman Genachowski at the start of the public comment period, saying:

> As individuals who have worked on the Internet and its predecessors continuously beginning in the late 1960s, we are very concerned that access to the Internet be both open and robust. We are very pleased by your recent proposal to initiate a proceeding for the consideration of safeguards to that end.
>
> In particular, we believe that your network neutrality proposal's key principles of "nondiscrimination" and "transparency" are necessary components of a pro- innovation public policy agenda for this nation.[5]

The FCC has put forward a lengthy and open process to get input from all viewpoints. While opponents of the proposed openness rules have voiced substantive objections, some of these voices have also resorted to negative and regrettable *ad hominem* attacks on supporters of openness policies, trying to portray them as fringe elements outside of the mainstream.[6] As demonstrated

---

Silverman, Stan Glasgow, Thomas S. Rogers, Evan Williams, Gilles BianRosa, Carl J. Grivner, Steven Chen, and Mark Pincus.)

[5] "Internet Pioneers, Company Founders, CEOs Send Letters to FCC in Support of Open Internet Initiative", *CircleID*, Oct. 19, 2009. *Available at*: http://www.circleid.com/posts/20091019_internet_pioneers_company_founders_ceo_send_letters_to_fcc/ (Signatories include: Vinton G. Cerf, Stephen D. Crocker, David P. Reed, Lauren Weinstein, and Daniel Lynch.)

[6] *See, e.g.*, Letter from National Cable & Telecommunications Association, CTIA, United States Telecom Association, *et al.* to Julius Genachoswki, Chairman, FCC,

above, support for adoption of open Internet rules has come from a wide spectrum of key scientific, business, and political leaders who hold a central role in our society. And, as demonstrated below, leading stakeholders share more views in common supporting the proposed rules than one might surmise from the rhetoric that is playing out in the media.

II. THE RECORD DEMONSTRATES WIDESPREAD SUPPORT FOR CODIFICATION OF THE SIX OPEN INTERNET PRINCPLES

A. A Wide Variety of Commenters Support Codification of the Broadband Policy Statement Principles, Buttressed by the Fifth Principle of Nondiscrimination and the Sixth Principle of Transparency

The above-referenced docket shows that commenters representing nearly every stakeholder in the Internet ecosystem support codification of the principles enumerated in the Broadband Policy Statement, plus the fifth principle of nondiscrimination and the sixth principle of transparency.

These stakeholders include consumer groups, educational institutions, Internet and technology companies and organizations, library organizations, direct broadcast satellite providers, Internet backbone providers, mobile broadband access providers, leading law professors and academics, and leading venture capitalists and entrepreneurs.[7]

GN Docket 09-191, WC Docket 07-52 (Feb. 22, 2010), at 5.

[7] *See, e.g.,* Comments of the American Library Association at 2-3 ("…codifying these Principles will give them added weight and demonstrate to all parties – Internet broadband providers, content providers, and information consumers – that the Commission is serious about maintaining an open Internet, free of

content discrimination… A [nondiscrimination] principle is essential to helping ensure equal access to content and preserving the open nature of the Internet. … The ALA supports [codifying a transparency] principle. …"); Comments of the Center for Democracy & Technology at 22, 23 and 31 ("CDT agrees that codifying the four existing principles will protect innovation and online free expression, including civic participation and democratic engagement. … CDT strongly agrees that a nondiscrimination principle is an essential component of a framework to protect the Internet's open nature. … CDT also strongly supports the Commission's inclusion of a transparency principle among the proposed rules."); Comments of Clearwire Corporation at 4, 7, 11, and 14 ("Openness is in Clearwire's DNA. It has built its network based on an open standard, and has committed to adhering to the four principles set forth in the Commission's *Internet Policy Statement*… Openness is not merely an important policy issue, it is good business practice. … As a threshold principle, carriers should offer full transparency to customers, applications, content and service providers about their network management practices, and how those practices may affect their experience. … Clearwire agrees with the Commission that nondiscrimination is an appropriate principle to consider for this open Internet proceeding…"); Comments of Netflix at 4 ("Netflix believes that the codification of the existing network neutrality principles, together with the addition of nondiscrimination and transparency, create an effective framework for preserving an open Internet."); Comments of Computer and Communications Industry Association at 5 ("CCIA states that it fully supports the Commission's adoption of the six principles outlined in the NPRM. … Codification of these principles is a necessary and appropriate step in ensuring that the Internet remains an open, competitive environment as the market structure of access, application, and content providers begins to take more definite shape."); Comments of NATOA at 2 ("We applaud the Commission's decision to defend and promote the open nature of the Internet by codifying its existing four Broadband principles. We further support codifying additional principles relating to non-discrimination and full transparency regarding the network management practices of network owners and operators."); Comments of Public Knowledge, Consumers Union, Media Access Project, New America Foundation, and Center for Media Justice at 1 ("Rules founded upon the codified principles set out in the *NPRM* are undeniably necessary for preserving the essential character of the open Internet and the tremendous value it engenders."); Comments of Skype, Inc. at 2 ("The six-principle framework proposed by the NPRM is the correct direction for the Commission, complemented by case-by-case adjudication."); Comments of Sling Media, Inc. at 1 ("Codifying the existing *Internet Policy Statement* principles in a technology-neutral manner, in addition to new proposed rules governing nondiscrimination and transparency, will protect consumers' ability to run applications and services of their choice..."); Comments of The Writers Guild of

Indeed, the widespread support for codifying the proposed rules is not surprising. Non-discrimination rules governed facilities based providers of the transmission component of Internet access for most of the commercial Internet's existence. And the comments in the docket reflect the common understanding that the Internet's openness is the key to its success as a driver of innovation, economic growth, and speech. In the end, there is no serious opposition to at least the codification of the Broadband Policy Statement's principles plus a transparency principle.

For instance, in Verizon's joint submission with Google, Verizon indicated its support for the Internet remaining "an unrestricted and open platform."[8] That submission also underscored Verizon's belief that users "should continue to have control over all aspects of their Internet experience, from the networks and

---

America, East at 1 ("The Writers Guild of American, East, AFL-CIO, supports the proposed codification of the six principles."); Comments of XO Communications, Inc., at 3-5, 12 ("Codified rules will help ensure that legacy broadband providers cannot pursue a strategy of profits through customer "ownership" instead of a strategy of investment, network expansion and innovation…. Adoption of the proposed rules will bring much-needed clarity and create a solid footing for increased investment and growth by all broadband network providers, helping to stimulate even greater positive "spillover" effects created by the development of new applications and services based on IP technologies….Codification of the proposed rules is fully consistent with XO's plans to invest and innovate in order to continue to meet the needs of its customers, many of which in turn help bring Americans they myriad services and other benefits made available by the broadband-driven Internet…..Clear rules guaranteeing openness are most likely to increase overall investment and innovation throughout 'the Internet ecosystem,' and to promote other social benefits.")

[8] *See* Joint Comments of Google and Verizon at 2 ("It is essential that the Internet remains an unrestricted and open platform, where people can access the lawful content, services, and applications of their choice.").

software they use, to the hardware they plug in to the Internet and the services they choose to access online."[9] Furthermore, Verizon supports codification of the Broadband Policy Statement's principles, codification of a transparency principle, and a case-by-case adjudicatory process to discipline entities that violate the rules.[10] In fact, the only significant differences between Verizon's statements in the joint submission and the OIC's comments are that Verizon does not support codification of a rule prohibiting discrimination or application of the rules to wireless platforms. Similarly, AT&T and Comcast support the application of the Broadband Policy Statement to broadband access networks, and the former supports an additional transparency principle.[11]

In other words, despite some unhelpful and misleading rhetoric from broadband access providers about the Commission even initiating this proceeding, it has become clear that there are only two significant areas of disagreement between the OIC and leading broadband access providers: the non-discrimination rule and application of rules to wireless platforms. With regard to these two areas where broadband providers diverge from the OIC, we believe that there is no significant reason for broadband providers to object.

For example, Verizon has stated repeatedly that it does not intend to block, degrade or deprioritize content. Note for example, Verizon's filing in the docket (WC Docket No. 07-52) where Verizon stated:

---

[9] *Id* at 3.
[10] *Id* at 7-8.
[11] Comments of AT&T Inc. at 1-2, 229; Comments of Comcast Corp. at 3-4.

> Verizon does not block or degrade packets traveling over the public Internet; in particular, it does not deprioritize or block traffic traveling over the Internet based on the senders' affiliation with Verizon (or lack thereof) or because that traffic may be considered harmful (or beneficial) to Verizon's commercial interests.[12]

Other broadband access providers have made similar statements, indicating that they are committed to open Internet principles.[13] If the broadband providers indeed do not intend to discriminate, then objections to codification of a non-discrimination rule are otiose. Many broadband providers publicly support codification of the Broadband Policy Statement's principles because these concepts are widely regarded as industry norms, with which they intend to comply. Statements by broadband providers that they will not discriminate likewise should counsel policymakers that applying the NPRM's proposed, simple non-discrimination rule would not harm broadband providers and would be consistent with their stance on codification of the Broadband Policy Statement's principles.[14] [15] Statements by network operators that they

---

[12] Comments of Verizon and Verizon Wireless, WC Docket No. 07-52, at 30 (June 15, 2007).

[13] *See, e.g.*, Comments of Comcast Corp. at 2, 4 (stating its commitment to operating consistent with the *Broadband Policy Statement* and its commitment to an open Internet).

[14] Notwithstanding Comcast's departure from those norms, which led to the dispute in Comcast Corporation v. Federal Communications Commission, No. 08-1291 (D.C. Cir. filed Sept. 4, 2008).

[15] *See also,* Jim Barthold, Verizon's Captain Charts Slow, Steady Course, *Telecommunications Online* (Feb. 9, 2006), http://www.telecommagazine.com/archives/article.asp?HH_ID=AR_1713 (Verizon CEO Ivan Seidenberg: "We don't block anything; never have, never will. It's not part of what we do."); Comments of Verizon and Verizon Wireless

intend to follow open Internet principles are meaningless if these providers of broadband access services are not held to their promises in the form of enforceable rules.

If, Verizon meant to draw a subtle distinction that its view on non-discrimination only applies to *depriotization* of content (note that Verizon did not mention its objection to *prioritization* of content), we hope the FCC would quickly dispense with such meaningless parsing of the concept of nondiscrimination. As the Commission knows, *deprioritization* of content necessarily means that other content will receive *prioritization*, at least relating to the content being deprioritized.[16] Quite simply, it is impossible to prioritize content without causing deprioritization of other content.

With regard to the broadband providers' concerns regarding application of the rules to wireless platforms, wireless providers are already making

---

at 12 ("There is no evidence that either Verizon or any other broadband access provider blocks or degrades access to lawful content or applications. And there is every reason to believe this will remain the case going forward because that is what consumers expect and demand."); Posting on Jim Gerace to Verizon PolicyBlog, http://policyblog.verizon.com (May 6, 2008, 06:08 PM EST), *available at* http://policyblog.verizon.com/BlogPost/461/OpenDevelopmentand700MHz.aspx ("Verizon Wireless - and all the other participants in the recent 700 MHz spectrum auction - understood the FCC's rules for using that spectrum in advance of the auction. Of course we'll abide by those rules. As we work to put the spectrum we won to good use, if Google or anybody else has evidence that we aren't playing by the rules, there are legitimate and expedited ways to address that.").

[16] M. Chris Riley and Robb Topolski, "The Hidden Harms of Application Bias," (Nov. 2009), *available at*: http://www.freepress.net/files/The_Hidden_Harms_of_Application_Bias.pdf

substantial moves towards openness platforms.[17] Verizon's arguments appear picayune after it successfully bid on the 700 MHz C Block auction in 2008. In that auction, the Commission placed open-access rules on the spectrum block that will prohibit the blocking or slowing Internet traffic from competing carriers, or from discriminating against devices trying to connect to the network.[18]

Prior to successfully bidding on the C Block spectrum, Verizon originally opposed and criticized the openness conditions that applied to the spectrum.[19] In fact, Verizon petitioned the U.S. Court of Appeals for the D.C. Circuit to "hold unlawful, vacate, enjoin, and set aside" the openness conditions in the auction.[20] Verizon later withdrew its petition.[21] Ultimately, Verizon bid and won the C

---

[17] *See, e.g.*, Comments of CTIA – The Wireless Association at 26 ("Experience since the Commission's ruling shows only more movement toward openness, not less."); Comments of Verizon and Verizon Wireless at 28 ("The wireless broadband marketplace also is moving toward increased openness, and network providers are providing mechanisms to facilitate development of third-party content and applications.").

[18] The Commission's open access rule is clear that C Block licensees "shall not deny, limit, or restrict the ability of their customers to use the devices and applications of their choice...." 47 C.F.R. § 27.16(b)

[19] *See,* Letter from R. Michael Senkowski, Counsel for Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 06-150, at 2 (Sept. 28, 2007) (emphasis added) ("Verizon Sept. 28 *Ex Parte*"). *See also* Letter from Ann D. Berkowitz, Associate Director-Federal Regulatory Advocacy, on behalf of Verizon Communications and Verizon Wireless, to Marlene Dortch, Secretary, FCC, WT Docket No. 06-150, at 1 (Sept. 19, 2007); Letter from John T. Scott, III, Vice President and Deputy General Counsel, on behalf of Verizon Communications and Verizon Wireless, WT Docket No. 06-150, at 1 (Sept. 25, 2007).

[20] Petition for Review, *Cellco Partnership d/b/a Verizon Wireless v. FCC*, Case No. 07-1359 (D.C. Cir.), Sept. 10, 2007.

[21] Motion of Cellco Partnership d/b/a Verizon Wireless for Voluntary Dismissal of Its Petition for Review and Protective Notice of Appeal, Case Nos. 07-1359 and

Block spectrum, spending $4.74 billion to secure the licenses for those airwaves. Verizon may have preferred to obtain the C Block spectrum without openness conditions, but it ultimately decided that the spectrum was valuable even with such conditions.

Further, the carriers are beginning to make numerous some additional, if in some case incomplete, moves toward openness.[22] Therefore, the Commission should be wary of any "sky-is-falling-down" rhetoric relating to application of the rules to wireless platforms.

Despite some broadband providers' objections to codifying a nondiscrimination principle and applying the rules to wireless platforms, ultimately the record in this proceeding (as well as sound public policy and common sense) support the OIC's position on these points. We look forward to continuing to work with the Commission as it codifies the six proposed rules, which will ensure that the qualities everyone—including broadband providers—believe make the Internet successful, will be protected.

07-1382 (D.C. Cir.), Oct. 22, 2007.

[22] *See supra* note 17 [check final footnote number]; *see also* Comments of AT&T at 145-146 ("The wireless marketplace has become a model of openness and consumer choice without regulatory intervention. … In other words, the marketplace is thriving in precisely the ways the NPRM advocates, even though the net neutrality principles have *never* been applied to wireless services."); Comments of T-Mobile USA, Inc. at 5.

B. The Broadband Marketplace Is Not As Competitive As Some Commenters Claim

Codification of the six principles will provide basic "rules of the road" to give consumers, network operators, and content and application providers some certainty about the openness of broadband networks and the Commission's ability and willingness to act in the face of acts that violate such rules (*e.g.*, blocking lawful traffic).[23] Although there are important reasons for the proposed rules to apply irrespective of a particular level of competition in the market for broadband Internet access services,[24] it is clear that the lack of competition for such services only heightens the need for a measure of certainty that broadband networks will remain open.

The OIC strongly disagrees with several commenters who assert that significant competition in the last mile broadband access market makes the proposed rules unnecessary. Wireline broadband access is still (at best) a duopoly consisting of services provided by one historic cable operator and one historic telephone company, though both now generally offer a similar bundled package of telephone, cable, and Internet access service.[25] In its National

---

[23] *See* Comments of XO Communications, Inc. at 14-15 ("Enforceable rules that address choice of content, applications, services, devices, and competitive options as well as nondiscrimination and transparency also will provide network owners, investors, and consumers assurance that the Internet will continue to serve as a platform for investment and innovation.").

[24] *See* Comments of Open Internet Coalition at 70-76.

[25] According to the FCC, "At most 2 providers of fixed broadband services will pass most homes." FCC September Commission Meeting slides, Sept. 29, 2009, *available at*,

Broadband Plan, the Commission states, "Given that approximately 96% of the population has at most two wireline providers, there are reasons to be concerned about wireline broadband competition in the United States."[26] While wireless broadband shows promising signs of emerging as an alternative for consumers, it still suffers from lack of adequate competition, and is not an adequate substitute for accessing certain applications and content, such as online video.[27] Thus, wireless broadband is more likely to act as a complement, not a substitute, for wireline broadband service.[28]

The wireline broadband access duopoly provides cable and telephone companies with significant market power, including the ability to charge higher prices and to engage in other anticompetitive practices. This market power also allows them to impose fees on content and applications providers.

In addition, as discussed in our initial comments, each broadband access provider has a terminating monopoly with respect to each user who subscribes to its service.[29] Because of this terminating access monopoly, even if consumers

---

http://www.fcc.gov/Daily_Releases/Daily_Business/2009/db0929/DOC-293742A1.pdf at 135.

[26] FCC, Connecting America: The National Broadband Plan, Mar. 16, 2010, at 37.

[27] *See* National Broadband Plan at 41 ("Wireless broadband may not be an effective substitute in the foreseeable future for consumers seeking high-speed connections at prices competitive with wireline offers."); Comments of Ad Hoc Telecommunications Users Committee at 9; Comments of Google Inc. at 21; Comments of Vonage Holdings Corp. at 8.

[28] *See* Nicholas Economides, *Why Imposing New Tolls on Third-Party Content and Application Threatens Innovation and Will Not Improve Broadband Providers' Investment* at 13, Jan. 2010 ("Economides").

[29] *See* Comments of the Open Internet Coalition at 72-73.

had more than two choices for residential broadband Internet access, the market failure would remain, necessitating the need for basic rules of the road.[30]

Finally, users face significant switching costs when changing Internet access providers. Consumers of wireless broadband services face significant switching costs because of the bundling of equipment with services,[31] but even wireline broadband service subscribers face significant costs associated with dealing with customer service representatives and technician appointments, education, etc. Such costs confer additional market power on broadband Internet access providers, providing additional justification for rules of the road that would apply regardless of whether consumers had more than two choices of providers.[32]

III. THE PROPOSED RULES SHOULD APPLY TO ALL BROADBAND PLATFORMS, INCLUDING WIRELESS BROADBAND INTERNET ACCESS NETWORKS

A. Wireless Broadband Internet Access Networks Should Not Be Exempt from the Proposed Rules

A wide array of commenters agrees that the Commission should adopt a technologically neutral policy toward openness for broadband access networks.[33]

---

[30] *See* Comments of the Open Internet Coalition at 27-30.
[31] *See* Section III.B, *infra*.
[32] Economides at 9-10.
[33] *See, e.g.*, Comments of Google at iii ("The policy framework adopted in this proceeding should be network agnostic, applying across both wireline and wireless broadband infrastructure. . . . Consumers enjoy services and applications across networks and expect seamless integration, usage and utility, regardless of whether the underlying networks are wired or wireless."); Comments of National Cable & Telecommunications Association at 46 (arguing that while implementation may be different across different types of networks,

Such a policy is consistent with Commission policies that establish a consistent regulatory framework across platforms[34] and that do not unwisely bias investment decisions in favor of a particular technology. Furthermore, the policy would reflect consumer experience and expectations. Consumers are becoming increasingly dependent on Internet access for education, work, and play. They want to be able to switch seamlessly between home, school, and work networks,

---

"there is no basis for differentiating among specific broadband Internet access technologies – current or future – with respect to the applicability of any rules ultimately adopted."); Comments of Comcast Corporation at 32 ("Differences between broadband technologies are not grounds for exempting any particular type of platform from the objectives of this proceeding."); Comments of Center for Democracy & Technology at 3 and 51 ("…the Internet openness rules should apply to all broadband Internet access service delivery platforms, including **wireless.** Wireless networks may require more aggressive traffic management… failing to address wireless would leave a gaping hole in a policy meant to promote openness or nondiscrimination on the Internet.") (emphasis in original); Comments of CenturyLink at 22-23 ("Wireline broadband service providers face the same problems as wireless providers — including the need to protect networks, manage capacity, and find incremental revenue. Wireless providers must expect to compete on the same playing field. The Commission cannot reasonably apply the proposed rules . . . more leniently based on a broadband service provider's technology."); Comments of ADTRAN at 15-16 ("If the Commission nevertheless decides to move forward with adopting rules, it must do so in a manner that does not favor particular technologies or rivals. … By way of example, if the Commission affords wireless Internet service providers with significantly greater flexibility than wireline providers to address capacity shortages by "throttling back" traffic, then wireless providers would have an artificial cost advantage because they could "manage" their way through congestion, rather than having to construct more capacity.").

[34] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, WT Docket No. 07-53, FCC 07-30, at 2, ¶ 2 (rel. Mar. 23, 2007) (classifying wireless broadband consistently with wireline broadband, and noting that such a classification "furthers [the Commission's] efforts to establish a consistent regulatory framework across broadband platforms by regulating like services in similar manner.") ("Wireless Broadband Order").

and between wired and wireless connections. Most importantly, consumers expect the same openness policies to apply across all broadband networks, and the Commission should not tolerate an environment in which consumers only can access certain websites or use certain applications on some networks and not others.

Applying the policy in a technologically neutral fashion does not mean that wireless and wireline broadband networks are competitive substitutes or that there might not be some circumstances in which a wireless broadband network would legitimately be treated differently under the policy than a wireline network. Wireless networks face particular network management challenges vis-à-vis wireline networks — from spectrum scarcity to shared network resources to the unpredictability of congestion caused by mobility. OIC's proposed definition of "reasonable network management" is broad enough to account for the unique technical characteristics of such. While such distinctions may result in slightly different application of the proposed rules to various types of broadband networks, it is not necessary to exclude wireless networks from the openness policy altogether.

B. Competition In The Wireless Broadband Marketplace Is Not Sufficient To Guarantee Openness in Mobile Networks

In their initial comments, representatives of the wireless industry argued that the proposed rules are not needed because the wireless industry is fiercely

competitive.[35] While it is clear and OIC agrees that the wireless market is more competitive than other telecom markets in the U.S. (such as the duopoly between wireline telephone and cable companies), and that the wireless market has seen significant innovation and growth over time,[36] we question the true extent of competition in the wireless market. As numerous Commission proceedings demonstrate, the "big two" wireless carriers — AT&T and Verizon — have clear advantages in market share, spectrum holdings, access to preferred devices,[37] and access to backhaul networks controlled by their affiliated wireline companies[38] that limit the benefits of competition to consumers.[39] Smaller

---

[35] *See* Comments of Qualcomm at 27; Comments of T-Mobile at 6; Comments of Verizon and Verizon Wireless at 21 and 31.

[36] *See generally* Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Thirteenth Report, WT Docket No. 08-27, DA 09-54 (rel. Jan. 16, 2009).

[37] *See* Rural Cellular Association Petition for Rulemaking regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497 (filed May 20, 2008); *see also* Statement of Senator John F. Kerry, *The Consumer Wireless Experience*, Hearing Before the Senate Committee on Science, Commerce, and Transportation, June 17, 2009 ("[O]ur second panel will examine the growing trend of exclusive agreements that are being struck between the four largest wireless carriers and the manufacturers of wireless handsets.").

[38] See Comments of Sprint Nextel Corp., WC Docket No. 05-25 (filed Jan. 19, 2010) (discussing problems in the market for special access services needed for wireless backhaul, and how relying on ILECs for special access services places competitive wireless carriers at a disadvantage); Reply Comments of T-Mobile, WC Docket No. 05-25, at 2 (filed Feb. 24, 2010) ("Consumers will enjoy the benefits of ubiquitous mobile broadband service and choice among service providers only if this connectivity – which ILECs offer through special access – is available at reasonable rates, terms, and conditions, particularly since consumer demand for mobile broadband services is growing exponentially."); Comments of the NoChokePoints Coalition, WC Docket No. 05-25, at 4-5 (filed Jan. 19, 2010) ("Special access services are critical inputs for broadband services provided by

competitors in rural or less populated markets nationwide are particularly disadvantaged, giving consumers in those areas fewer choices.

Moreover, given high switching costs associated with wireless service offerings, consumers are often prevented from taking advantage of whatever choice among service providers exists in their part of the country. Switching costs in the wireless industry may cause a consumer lock-in effect, which results in repeated purchases from the same supplier even when competing entities offer lower prices and better product quality.

Significantly, in the attached study analyzing wireless switching costs, Joseph Cullen and Oleksandr Scherbakov estimate the costs associated with changing wireless providers to be approximately $230.[40]

This estimate is a composite of the explicit costs involved in switching, including the early termination fees incurred under wireless contracts, and also

---

rural telecommunications carriers and wireless carriers, and therefore are essential for broadband deployment and competition.")

[39] *See* Letter from Senator Herb Kohl, Chairman, Subcommittee on Antitrust, Competition Policy, and Consumer Rights to Hon. Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, and Hon. Julius Genachowski, Chairman, FCC, July 6, 2009 (discussing several areas of concern in which the wireless marketplace is not sufficiently open to competition and where new entrants face high barriers to entry).

[40] Joseph Cullen and Oleksandr Scherbakov, Measuring Consumer Switching Costs in the Wireless Industry, Apr. 5, 2010. ("Cullen/Scherbakov Study"). This conclusion was obtained using data from an extensive consumer survey of U.S. cell phone users. The data are an annual sample of 32,000 consumers from 2005-2009. It contains detailed demographic characteristics such as age, gender, employment status, and income. The data also contain numerous handset and carrier characteristics such as monthly subscription fee, handset price, model, type and size of display, availability and resolution of camera, and other pertinent facts.

less tangible, implicit costs such as time on the phone with providers setting up new service and canceling existing service, setting up billing, or loss of cell phone use during the switch. The study by Cullen and Shcherbakov underscores that even in the relatively more competitive wireless market, consumers still are precluded from taking advantage of increased competition due to substantial switching costs.

C. The Proposed Rules Are Consistent With the Decision to Impose an Openness Condition on the 700 MHz C Block Licensee

Representatives of the wireless industry argued that the price of the winning bid in the 700 MHz C Block, an auction that included an open access requirement for devices and applications, provides evidence of the "harm" that the proposed openness rules will cause.[41] This alleged "harm" is a matter of conjecture.

Many factors go into pricing in auctions. Comparing the winning bid for one set of licenses with the winning bids from previous auctions or even different bands with different geographic coverage is comparing apples to oranges. CTIA, for example, compares winning bids for C Block regional licenses with winning bids for large metropolitan centers within those regions, concluding that the winning C Block bids reflect a discount for the "uncertainty"

---

[41] *See* Comments of CTIA – The Wireless Association at 35 ("The Commission's application of open access regulation to the Upper 700 MHz C Block sharply demonstrates that the uncertainty injected into the market by such rules has a demonstrable effect on the value of spectrum.")

caused by the openness conditions.[42] However, the B Block license prices discussed by CTIA could have been higher because numerous entities were bidding for more populated CMAs seeking to meet greater urban demand, or because the B Block licenses cover highly populated and profitable service areas covering a larger region without build out requirements. In short, given the differences between the licenses being auctioned, any differences between winning bids for the 700 MHz C Block licenses and other licenses could have more to do with the auction's design[43] than the substantive rules attached to such licenses.

At the same time that the wireless carriers are arguing that the openness rules caused "harm" that is reflected in a discount on the amount bid in the C block auction, they attempt to argue that the proposed rules are not needed because carriers are moving toward openness policies on their own[44] If it were in fact the case that the carriers are adopting the same openness policies as set forth in the rules, then it stands to reason that there could be no "harm" that would cause a discount from the FCC adopting the very rules they say they are adopting on their own. In any event, as mentioned earlier in Section III, Verizon

[42] *See* Comments of CTIA at 35-38.

[43] There are, of course, numerous studies by economists and game theorists that discuss the relationship between the design of an auction and its eventual result. *See generally* Paul Klemperer, *What Really Matters in Auction Design*, Journal of Economic Perspectives, Vol. 16, No. 1, at 169-89 (Winter 2002) (discussing factors for successful auction design and noting that the different outcomes for 3G mobile spectrum auctions in Europe had much to do with different auction designs).

[44] CTIA Comments at 26-27.

and other carriers did successfully bid billions of dollars on the C block licenses notwithstanding the openness requirement, so the rules clearly did not inhibit investment in the marketplace.

Moreover, the Commission's policies should not be driven solely by the goal of maximizing auction revenue, but rather, the public interest taken as a whole. Auctioning spectrum with no openness or nondiscrimination requirements may allow wireless carriers to better capture monopoly rents in downstream markets, but such a result will not maximize consumer welfare, which is better served by an approach that balances the interests of applications developers and device manufacturers with those of carriers.

Finally, wireless industry representatives argue that the proposed openness rules, if imposed on wireless carriers, would be unfair to licensees that may have made higher bids on spectrum that did not have openness conditions.[45] However, all licensees are aware that the Commission may adopt new rules when the public interest so demands, and their winning bids account for the regulatory uncertainty associated with such policy changes. The Commission's rules regarding, for example, number portability and E911 location requirements, imposed requirements that may have effectively reduced the value of their existing licenses, but this was not deemed a reason to preclude adoption of such rules.

[45] CTIA Comments at 25.

IV. THE COMMISSION SHOULD PROCEED WITH THE PROPOSED NONDISCRIMINATION RULE, WITH A FLEXIBLE EXCEPTION FOR REASONABLE NETWORK MANAGEMENT

Several commenters argued that a strict nondiscrimination rule would foreclose pro-consumer practices.[46] However, as the OIC noted in its initial comments, a flexible "reasonable network management" standard allows for such practices.

Anything less than a clear nondiscrimination standard, will fail to protect consumers and innovation. There are no legitimate reasons why a broadband Internet access provider should discriminate against lawful content or applications, except where such discrimination is necessary and proper under a flexible reasonable network management standard. Such a flexible standard will to ensure that pro-consumer network management practices are permitted even with a general nondiscrimination standard. Any concerns that broadband

---

[46] *See, e.g.*, Comments of CenturyLink at 17 ("The proposed [nondiscrimination] rules…effectively preclude demand-based pricing – pricing that saves consumers money, promotes fair and efficient network usage, and enables innovations like bursts in speed for cost-effective access to large content downloads or specialty applications."); Comments of Communications Workers of America at v ("The *NPRM*'s proposed strict nondiscrimination language would restrict many practices that would benefit consumers. It would prohibit broadband Internet access providers from providing QoS offerings and content delivery network services, like caching content closer to end-users, to content, application and service providers for a fee.") Comments of CTIA – The Wireless Association at 46 ("Imposition of the proposed net neutrality rules will freeze the current business model for wireless services, stifling innovative technologies, service offerings and interactions among ecosystem players that benefit consumers."); Comments of Verizon and Verizon Wireless at 66 ("…the proposed rule would go well beyond merely restricting conduct that is affirmatively anticompetitive and therefore harms consumers to reach 'discrimination' or differentiation that is pro-competitive and benefits consumers.")

providers have raised regarding their ability to engage in pro-consumer network practices can and should be addressed through the adoption of the flexible, reasonable network management standard advocated by the OIC.[47]

V. THE EXCEPTION FOR "REASONABLE NETWORK MANAGEMENT" SHOULD NOT PERMIT FILTERING OF LAWFUL CONTENT

The OIC strongly opposes the phrases: "prevent[ing] the transfer of unlawful content" or "prevent[ing] the unlawful transfer of content"[48] in the definition of "reasonable network management."

As discussed in detail in OIC's initial comments, the proposed rules apply only to lawful content. Yet the FCC's proposed Reasonable Network Management exception to the nondiscrimination rule, allows a broadband Internet access provider to discriminate against lawful content under certain limited circumstances. If the broadband Internet access provider discriminates against *unlawful* content, however, the nondiscrimination rule does not apply. Therefore, blocking the transfer of *unlawful content* would create *no* jeopardy of a rule violation for the broadband Internet access provider.[49]

As a result, if a broadband Internet access provider discriminates against

---

[47] *See* Comments of the Open Internet Coalition at 41-51.

[48] *See sections* 8.3(a)(iii) and (iv) of the Draft Proposed Rules for Public Input, Appendix A.

[49] This point was recognized, as well, by the Motion Picture Association of America, Inc. ("MPAA"). Comments of MPAA at i ("MPAA therefore appreciates the Commission's clear recognition in the *Notice* that 'open Internet principles' do not apply to 'activities such as the unlawful distribution of copyrighted works….").

unlawful content, there is no need to apply the Reasonable Network Management exception. In such a situation, the nondiscrimination rule simply would not apply.

If the proposed Reasonable Network Management exception is not amended in the manner that the OIC suggests in its initial comments, the exception likely would be used to justify discrimination against some *lawful* content in order to prevent the transfer of *unlawful* content. This outcome raises several concerns, including—

- It likely would put the rules at odds with specific content-related statutory provisions and frameworks regarding the handling of both lawful and unlawful content;[50]

- It raises the likelihood of a challenge of the rules on Constitutional grounds and the re-application of the *Comcast* strict scrutiny standard the Commission proposed not to codify;

- It may violate the Wiretap Act;

- It raises substantial privacy concerns; and

- It violates basic principles of network management by encouraging broadband Internet access providers to make sophisticated legal judgments about the nature of content over their networks.[51]

Deleting sections 8.3(a)(iii) and (iv) of the Draft Proposed Rules would not

---

[50] *See also,* Comments of MPAA at 11, n. 27 ("In fact, copyright law already requires that service providers meet a number of conditions in order to receive the benefit of the safe harbor provided by the Digital Millennium Copyright Act ["DMCA'"]…. Whatever requirements are imposed by the FCC should further [the DMCA policy of promoting cooperation between copyright owners and service providers] and certainly should in no way be in conflict with [DMCA] requirements.")

[51] For a detailed explanation of these concerns, *see* Comments of OIC at 54-67.

prevent a service provider from refusing to transmit copyrighted material if the transfer of that material would violate applicable laws. Likewise, deleting sections 8.3(a)(iii) and (iv) would not prevent a service provider from taking steps consistent with the Digital Millennium Copyright Act regarding the termination of service to repeat infringers or adopting a "graduated response" regime.

Inclusion of sections 8.3(a)(iii) and (iv), however, would create confusion and legal challenges that would undermine the policy objectives articulated by Chairman Genachowski, that "illegal content be curtailed on the Internet."[52]

VI. THE LACK OF CLARITY OR CONSENSUS ABOUT WHAT CONSTITUTES "MANAGED SERVICES" DEMONSTRATES THAT ADOPTING RULES FOR SUCH SERVICES IS PREMATURE

The comments demonstrate little clarity and no consensus about how to define "managed services," let alone the framework in which to analyze such services.[53]

---

[52] *Preserving a Free and Open Internet: A Platform for Innovation, Opportunity, and Prosperity,* Prepared Remarks of Chairman Julius Genachowski, FCC, The Brookings Institution (Sept. 21, 2009).

[53] *See* Comments of AT&T at 101 ("[The FCC] would be hard-pressed, however, to come up with any type of workable definition of 'managed services.' … No such definition would be available, and trying to devise one would be a fool's errand."); Comments of Communications Workers of America at 24 ("The *NPRM* struggles to define 'managed' or 'specialized' services in a way that would draw a predictable and meaningful distinction between those services and other commercial broadband Internet access-related services provided over the public Internet."); Comments of QUALCOMM at 25 ("Trying to fashion service-by-service rules or policies is a fool's errand because as soon as the ink is dry on the rules or policies, new services will be launched, and the rules or policies will have to be revised.").

The Commission should not address the issue of "managed services" in this proceeding. As OIC noted in its initial comments, the proposed rules apply to "broadband Internet access services," and not to other services such as those that are classified under Titles II and VI. To the extent there is a need to clarify that certain services are not subject to the proposed openness rules, this should be done by reference to existing statutory and regulatory classifications rather than by creating a new category of services.[54] There is no need to muddy the waters without a better understanding of what services, if any, would fall within the "managed services" category.

VII. THE INCLUSION OF CONTENT FILTERING AND "MANAGED SERVICES" IN THE REASONABLE NETWORK MANAGEMENT EXCEPTION THREATENS INTERNET ANONYMITY

By exempting content filtering and prioritization of "managed services" from the proposed rules, the Commission is authorizing a wholesale invasion of all Internet users' anonymity. In order to identify specific content and services for non-neutral treatment, whether to block or to prioritize them, broadband Internet access providers must inspect every communication that travels their networks. To do so, providers will use Deep Packet Inspection and other highly controversial technologies. For the sake of blocking some unlawful content and prioritizing a small number of services, the Commission is proposing that all

---

[54] *See* Comments of AT&T at 7 ("Adopting this more precise and workable definition of broadband Internet access service will obviate the need to create any ad hoc category of 'managed or specialize' services, which the Commission could neither coherently define nor reasonably regulate.")

Internet users must forfeit their right to remain anonymous.

The Commission should not be persuaded by the content owners' arguments that their pecuniary rights take precedence over all Internet users' fundamental right to anonymity in their online communications.[55] No fair balancing of rights can support this guilty-until-proven-innocent policy. For this reason, Internet users' fundamental rights also should not give way to the questionable need for "managed services."

User anonymity, as well as neutrality, is a principle that has been embedded into the Internet since its inception and has been an essential part of its tremendous success. As with the mail and telephone, Internet users have always been able to trust that the content of their privileged and confidential communications will remain private from those third parties that carry those communications. This traditional expectation of anonymity has become a cornerstone for e-commerce and free expression. Should the Commission authorize the wholesale invasion of users' anonymity for these dubious purposes, this vital element of the open Internet will be threatened. The Commission should not sanction or endorse network management practices that will enable carriers of packets unilaterally to invade users' rights to remain

[55] *See* Comments of The Songwriters Guild of America ["SGA"] at 7 ("SGA is certainly open to regulation that would benefit copyright users, such as an affirmative rule requiring use of some of the technologies described above (e.g., fingerprinting, watermarking, etc.) to protect copyrighted work in the network environment."). *See also* Comments of RIAA at 12-15. *See also* Comments of MPAA at 12-14.

anonymous.

VIII. THE COMMISSION HAS JURISDICTION TO ADOPT THE PROPOSED RULES

Given recent D.C. Circuit decision in *Comcast v. FCC*,[56] OIC suggests that the Commission issue a Public Notice as soon as possible regarding its authority to regulate the telecommunications component of broadband Internet access services. As discussed below, the issue of the Commission's regulatory authority over such services is crucial to several vital policies beyond the important policies at stake at this proceeding. Clarifying the Commission's authority over broadband Internet access services is extremely important to the future of coherent communications policy in the United States.

OIC believes that the Commission has the authority required to adopt the proposed rules. Indeed, the *Comcast* case merely cast significant doubt on one legal theory for Commission authority to regulate broadband Internet access services. Perhaps not surprisingly, network operators argue that the Commission lacks authority to adopt the proposed open Internet rules. If the network operators' arguments are correct, broadband access providers that control the essential telecommunications input for Internet access services can block content or applications at their whim, and the Commission would be powerless. Such an outcome would be anti-consumer, and would leave the Commission all but powerless to protect consumers of the most vital communications network of the

[56] No. 08-1291 (D.C. Cir. Apr. 6, 2010).

21st century United States.

It is also important to note that the debate regarding the Commission's authority goes further than the proposed open broadband rules. If the Commission is found to lack authority to regulate broadband Internet access services, its authority over numerous policies that affect broadband services would be called into question. For example, the Commission is considering whether to expand the Federal Universal Service Fund ("USF") disbursements to cover broadband deployment in rural and low-income areas, a policy that has widespread support.[57] However, should the Commission be deemed to lack authority to regulate broadband access services, it is unclear whether it would lawfully be able to fund such deployment for rural and low-income Americans especially during a time when bridging the digital divide is an important part of overcoming growing economic disparities. Similarly, should the Commission be deemed to lack authority over the transmission component of broadband services, it would call into question the Commission's ability to adopt broadband consumer protection policies in a number of areas ranging from truth-in-billing and other transparency requirements that help consumers make informed

---

[57] *See Connect America Fund; A National Broadband Plan for Our Future; High-Cost Universal Service Support*, Notice of Inquiry and Notice of Proposed Rulemaking, WC Docket Nos. 10-90 & 05-337, GN Docket No. 09-51, FCC 10-58 (rel. Apr. 21, 2010); *see also*, Frontier Communications Applauds FCC's Effort to Support Rural Broadband Deployment and Reform USF and ICC, *MarketWatch*, Mar. 5, 2010, *available at*: http://www.marketwatch.com/story/frontier-communications-applauds-fccs-effort-to-support-rural-broadband-deployment-and-reform-usf-and-icc-2010-03-05?reflink=MW_news_stmp

decisions, to privacy protections similar to the CPNI rules in place for telecommunications services, and disabilities access rules for broadband consumers.

IX. THE PROPOSED RULES ARE CONSISTENT WITH THE FIRST AND FIFTH AMENDMENTS

A. The Proposed Rules Are Consistent With the First Amendment

Opponents of the proposed openness rules argue that the rules would be unconstitutional under the First Amendment. Such contentions continue a regrettable pattern that distorts the common understanding of First Amendment precedent and would remove entire topics from the Commission's purview regardless of the proposed policies' merits.[58] Such arguments also attack policies aimed at countering discrimination for economic reasons and promoting consumer choice in content, applications, and devices for allegedly impermissibly violating network operators' rights. The Commission should reject such arguments —which, if taken to their logical extreme, would prohibit the FCC from addressing even network operators' most egregious acts of anticompetitive discrimination and from adopting even the most reasonable limits to remedy such discrimination.

The proposed rules are properly thought of as economic and technical regulation transmission facilities that use public rights of way and public

[58] *See, e.g., Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 962 (D.C. Cir. 1995) (rejecting First Amendment challenges to eight of nine different provisions of the 1992 and 1984 Cable Acts, including rate regulation, subscriber limitation, channel occupancy, municipal immunity, etc.).

spectrum and create a terminating monopoly for each consumer. Thus, they do not implicate First Amendment concerns. The First Amendment does not shield network operators from generally applicable rules designed to foster openness in maintaining a channel of public communication. Nor does the First Amendment preclude adoption of rules to guard against economic discrimination by broadband network operators against content or application competitors.[59] A network operator is not engaging in "editorial discretion" when it discriminates against a voice software application that threatens its bottom line, or when it shapes traffic on its network during times of congestion in order to conserve resources. Instead, such an operator would be engaging in economic discrimination, or technical network management, that is properly subject to regulatory oversight unconstrained by the First Amendment.

"Network management" is not an exercise of editorial discretion by the carriers. Unlike the parade organizer who decides who can march in a parade,[60] broadband network operators — and communications networks more generally — facilitate communications between third parties and end users of networks. And, notwithstanding references to cases involving newspapers and other media

---

[59] *Cf. Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, WT Docket No 06-150, FCC 07-132, 87, ¶ 217 ("To the extent that a choice of device or application implicates First Amendment values at all, we think that our requirements promote rather than restrict expressive freedom because they provide consumers with greater choice in the devices and applications they may use to communicate.").

[60] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 570-77 (1995).

outlets, messages received via broadband networks are not viewed as being crafted, by endorsed by, or associated with, the particular network operator. Perhaps most importantly, "information services" as defined by the Communications Act are provided "via telecommunications", which is defined as "the transmission, between or among points *specified by the user, of information of the user's choosing*, without change in the form or content of the information as sent and received." 47 U.S.C 153(43). The network operator does not change or control the user's information when it provides telecommunications, so by definition the network operator does not exercise any editorial discretion which is protected under the First Amendment.

Under the expansive view urged by the Internet access providers, the Commission potentially would be prevented from addressing anti-competitive behavior on their part, and the providers could freely block content, applications and services under the guise of "editorial discretion." Under this logic, a telecommunications carrier might argue that interconnection requirements were a form of compelled speech, or that requirements to provide special access services to competing carriers violated the carrier's First Amendment rights to affiliate with whomever they choose.

A comparison of the proposed rules with the must-carry rules at issue in the *Turner* cases is instructional. [61] The must-carry rules upheld in *Turner*

[61] See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*"); see also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*").

involved mandatory carriage of signals over a cable network regulated under Title VI of the Communications Act. Under Title VI, Congress specifically designated cable operators as broadcasters who are able to exercise editorial control over the video programming carried on the cable network. In contrast, the proposed rules would apply to networks used to provide broadband Internet access, which the FCC has determined is an information service. As discussed above, information services are provided "via telecommunications" which are controlled by the user, not the network operator. Network operators do not select what content is carried on the Internet. When a user visits the *New York Times* website or *TMZ*, the user is viewing content that is not hosted or controlled by the user's broadband access provider, but rather is delivered via the provider's connection per the user's selection. Thus, the "speech" delivered via an open Internet is not attributable to the broadband Internet access provider and there is no issue of editorial discretion or compelled speech or any of the other issues that raise First Amendment concerns.

Should the proposed rules be subject to First Amendment scrutiny, they would nevertheless be permissible as content neutral rules analyzed under intermediate scrutiny analysis. Under such analysis, a content neutral regulation will be sustained if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than

is necessary to further those interests.[62] Here, the important governmental interests include preserving the free exchange of ideas and content over an open Internet, maximizing consumer choice in the broadband marketplace that is playing an increasingly vital role in our society and economy, and protecting competition throughout the Internet marketplace of network operators, applications developers, device manufacturers, and others. The proposed openness rules are unrelated to the suppression of free speech. In fact, the rules would promote free speech by ensuring that broadband providers' economic or other incentives do not prevent users from accessing content or applications of their choice. Finally, to the extent that the proposed rules burden speech at all, they do so only indirectly — *i.e.*, the proposed rules do not prohibit broadband providers from "speaking," they merely require the broadband providers not to block or discriminate against unaffiliated content or applications. Moreover, the proposed rules allow broadband Internet access providers to engage in reasonable network management and adopt a sensible, case-by-case approach, further ensuring that the rules do not burden any more speech than is necessary to effectuate the goals discussed above.

B. The Proposed Rules Are Consistent With the Fifth Amendment

Despite some broadband providers' claims,[63] the proposed rules do not

---

[62] *Turner I*, 512 U.S. at 662; *see also Turner II*, 520 U.S. 189; *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[63] Comments of AT&T at 244-48; Comments of Verizon and Verizon Wireless at 118-23.

constitute a "taking" under the Fifth Amendment. These takings clause arguments are at odds with established law and mark a disappointing strategy by network operators to attempt to handcuff the Commission by characterizing policy choices as being beyond the FCC's power.[64]

Notwithstanding broadband providers' claims, the proposed rules do not constitute a physical occupation or taking of their property. While classic takings cases involve property seized by the government, courts have also held that a "permanent physical occupation" can constitute a taking.[65] The proposed rules contemplate no such physical occupation, permanent or otherwise. Rules prohibiting discrimination in traffic carried over broadband networks do not amount to "mandatory carriage" of Internet traffic. Even if they did, courts have upheld the Commission's view that mandatory carriage rules in the cable context do not constitute takings under the Fifth Amendment.[66]

AT&T also argues that the proposed rules amount to a physical invasion

---

[64] *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

[65] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27 (1982).

[66] 22 FCC Rcd at 21058, ¶ 8, *aff'd* Cablevision Systems v. FCC, 570 F.3d 83, 98 (2d Cir. 2009). Of course, the analogy to mandatory carriage on cable systems does not hold up. First, the cable rules involve specific carriage requirements, with signals occupying a specific amount of capacity on a cable system, rather than generalized nondiscrimination rules that do not mandate the carriage of particular content or setting aside capacity for third-parties. Second, and more importantly, as noted *supra* in Section IX.A, broadband access networks are different from cable systems in that the latter are "private" systems while the former provide access to the public Internet. Traffic travels over broadband access networks based on the end user's selection, and network operators are not being forced to dedicate specific portions of their network to third-party content.

of its property because the regulations would require AT&T to purchase new network equipment.[67] But such a reading of takings law would strike down any regulation that required parties to make an investment in order to comply with the law.[68] Thus, any regulation addressing, for example, workplace, airline or building safety that required the purchase of equipment to comply would be outlawed.

Finally, the proposed rules do not amount to a regulatory taking. The doctrine of regulatory takings recognizes that in addition to traditional cases of physical occupation, there are times when regulation so diminishes the value of property that it amounts to a taking. The proposed rules, however, do no such thing. In fact, the best proof that the regulations do not constitute a regulatory taking is broadband providers' arguments that because the market is moving toward open networks, the proposed rules are unnecessary.[69] If broadband

---

[67] Comments of AT&T at 244-46.

[68] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) ("So long as these regulations do not require the [property owner] to suffer the physical occupation of a portion of his [property] by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.").

[69] *See, e.g.*, Comments of AT&T at 145-146 ("The wireless marketplace has become a model of openness and consumer choice without regulatory intervention. … In other words, the marketplace is thriving in precisely the ways the NPRM advocates, even though the net neutrality principles have *never* been applied to wireless services."); Comments of CTIA – The Wireless Association at 26 ("Experience since the Commission's ruling shows only more movement toward openness, not less."); Comments of Verizon and Verizon Wireless at 28 ("The wireless broadband marketplace also is moving toward increased openness, and network providers are providing mechanisms to facilitate development of third-party content and applications.")

providers claim that their behavior would be substantially the same absent the proposed rules, it is hard to understand how the rules could also constitute a regulatory taking.

Analysis of whether there has been a regulatory taking is typically fact-based, but focuses on three main factors: (1) the economic impact of the proposed regulation, (2) whether the regulation interferes with distinct investment-backed expectations, and (3) the character of the government regulation.[70] None of these factors favor a finding of a regulatory taking.

First, the economic impact of the proposed rules on broadband providers is not significant enough to approach the level of a taking. As noted above, several broadband providers argue that they operate their networks in an open fashion, demonstrating that operators can act consistently with the proposed rules without suffering significant loss of revenue.[71] Second, the proposed rules cannot be said to interfere with any reasonable investment-backed expectations. The question of openness of broadband networks has been a matter of debate at the Commission for as long as broadband networks have existed. Indeed, when wireline broadband access was classified as a Title I service, the Commission issued a Policy Statement similar to the proposed rules in this proceeding and

---

[70] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

[71] While AT&T claims that the proposed rules would amount to a taking of specific lines of business, such as the "quality-of-service business", (Comments of AT&T at 247), OIC submits that this is not the appropriate property interest to analyze for takings purposes. With any regulation, entities are precluded from specific business practices that directly contravene the regulations, but any lost revenues related thereto hardly constitute a taking.

stated that future Commission policies with respect to broadband networks would be consistent with the four principles set forth in that statement. Finally, the proposed rules are general in character, which weighs against a finding of a taking. The proposed rules are intended to promote an open Internet and amount to a "public program adjusting the benefits and burdens of economic life to promote the common good."[72]

X. THE PROPOSED RULES SHOULD NOT APPLY TO CONTENT AND APPLICATIONS PROVIDERS

The argument that the proposed rules should apply to edge providers of content and applications is a red herring. The proposed rules apply to broadband access service, where broadband providers have the unique incentive and ability to discriminate for or against traffic delivered over networks over which they exert control. Application of the proposed rules to content and applications providers plainly exceeds the scope of this proceeding. Nothing in the record supports application to content and application providers because there is no evidence in the record that those providers have been engaging in behavior that the proposed rules are intended to address.

There is widespread agreement that any rules should not apply to application- or content-providers. In their joint submission, Google and Verizon agree that Internet applications, content, and services should remain free from

[72] *Penn. Cent. Transp. Co v. New York City*, 438 U.S. 104, 124 (1978).

regulation.[73]

The proposed rules are not intended to result in open-ended regulation of the content and services made available over the Internet and are not intended to apply to edge providers of applications and content. Such providers operate in a market that is subject to extremely robust competition, is not characterized by the barriers to entry that come with the control of transmission networks, and that has been appropriately left unregulated. The FCC also lacks jurisdiction over Internet content and applications. In such a competitive market with minimal barriers to entry, antitrust laws and the Federal Trade Commission Act remain available to protect consumers in the event of any anticompetitive behavior of the part of content and applications providers.

XI. AN OPEN INTERNET BENEFITS SMALL AND MEDIUM SIZED BUSINESSES

Small and medium-sized businesses represent more than half of the U.S. gross domestic product ("GDP") and generate two-thirds of new jobs. According to the U.S. Small Business Administration, small businesses represent 99.7 percent of all employer firms, employ just over half of all private sector employees, generate more than half of the non-farm private GDP, and pay 44 percent of total U.S. private payroll.

Small and medium-sized businesses have generated 64 percent of net new

[73] *See*, Joint Comments of Google and Verizon at 3 "Google and Verizon agree that communications laws and regulations should not apply to Internet applications, content, or services."

jobs over the past 15 years. And, such businesses play a major role in international trade, making up 97.33 percent of all identified exporters and producing 30.2 percent of known export value in FY 2007.

Small and medium sized businesses are also innovators. They produce 13 times more patents per employee than large patenting firms, and such patents are twice as likely as large firm patents to be among the one percent most cited.

In the attached paper entitled, "Small Business and Broadband: Key Drivers for Economic Recovery," Professors Jayakar, Schejter, and Taylor note that broadband access, eBusiness, and the emerging systems of "cloud" computing have the potential to multiply the productivity, efficiency, and profitability of small and medium-sized businesses.[74] Yet the paper points out that while broadband Internet access is an indispensable tool for small businesses to compete effectively in the new economy, small businesses face significant constraints in accessing broadband and utilizing it effectively. A national survey indicated that 27 percent of small businesses do not subscribe to any Internet access service. And, dialup services were used by 38 percent of small businesses.

The study indicated, however, the importance that small businesses place on telecommunications services. Furthermore, small firms spend disproportionately more on telecommunications services. For example, firms with less than five employees spent approximately $83 per employee for local

---

[74] Krishna Jayakar, Amit Schejter, and Richard Taylor, *Small Business and Broadband: Key Drivers for Economic Recovery*, Mar. 2010, at 24.

and long distance telephone service, while firms with between five and nine employees spent $50 per employee, and firms with between ten and 499 employees spent $21 per employee.[75] This data indicates that many small businesses understand that traditional telecommunications services are essential but do not yet understand the potential benefits that broadband services would provide to their firms.

Professors Jayakar, Schejter, and Taylor find that "eBusiness" and "cloud" computing have enabled small businesses to achieve production efficiencies, reduce marketing expenditures, develop and deploy new products and services, and seek out new markets. Other small businesses that have not adopted broadband will need to be educated to understand how broadband can benefit their businesses.

The paper concludes that a key factor in small and medium-sized businesses being able to leverage the full benefit of the broadband Internet's dynamic network externalities is having unimpeded access to a user base, and those that do not are then able to access the full spectrum of products and services deployed online. Professors Jayakar, Schejter, and Taylor argue that the adoption of broadband openness rules are part of the recipe that will enable small firms to take advantage of the dynamic network externalities of broadband Internet.[76]

---

[75] *Id.* at 21.
[76] *Id*. at 35.

XII. CONCLUSION

The decision in *Comcast v. FCC* certainly throws into serious question the legal theories on authority cited by the Commission in the above-captioned proceeding to move forward on implementing the proposed rules. As discussed above, however, the court's decision did not hold that the FCC lacks any legal authority to enforce rules against broadband access providers. OIC members universally believe that the Commission has ample authority to proceed with this rulemaking, as well as with the implementation of the National Broadband Plan.

At the current moment, however, consumers lack any protection against intentional or unintentional violations of the Internet Policy Statement, or against discriminatory treatment of content or applications over broadband providers' networks. It is imperative that the Commission move expeditiously to solidify its legal authority by initiating a generic proceeding, through the circulation of a Public Notice, which would lay out a regulatory framework for broadband networks and services based on solid legal footing.

Once this occurs, the Commission will be able to finalize its proposed rules in the above-captioned docket. And for the reasons stated in these reply comments, as well as our initial comments, the OIC urges the Commission to adopt the rules, as modified by the OIC.